Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

MORETON ROLLESTON, JR.,

Petitioner,

v.

SANDEASE, LTD., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

SUPPLEMENTAL APPENDIX

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APPENDIX D

[Filed May 3 2001]

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File
No. 2000CV28720

MORETON ROLLESTON, JR.,

Plaintiff,

v.

SANDEASE, LTD; COAST HOUSE, LTD;
JOSEPH A. McBRIDE; TIMOTHY B. McBRIDE;
FRANK McBRIDE, JR., and ROBERT C. KOSKI,

Defendants.

FINAL ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

This case arises out of a long history of litigation between these parties. Briefly, Plaintiff in this action previously represented Rebecca Wight Cherry Sims (now deceased) concerning title to and the disposition of certain property on St. Simon Island. Eventually, after title to the property was litigated, it was to be sold to Coast House, Ltd. ("Coast House") in May of 1995, but Plain-

tiff directed his client not to appear at the closing.[1] The failure of this closing subsequently led to numerous lawsuits between Rolleston, the Cherry Estate, and the Defendants herein.

The current litigation revolves around a settlement agreement between Defendants and the Cherry Estate, in which Defendants Coast House and Sandease, Ltd. ("Sandease") agreed to pay the costs incurred by the Cherry Estate in pursuing its malpractice action against Plaintiff. Defendant Koski apparnetly authored the agreement as counsel. Plaintiff contends in this action that the settlement agreement is void and unenforceable, as it constitutes champerty and barratry. Plaintiff also seeks to recover against the Defendants for abusive litigation. This case is currently before this Court on Defendant Koski's motion for summary judgment and the remaining Defendants' motion to dismiss.

(1) Motion for Summary Judgment

In his motion, Defendant Koski asserts that he is entitled to summary judgment on all claims in Plaintiff's complaint on the baiss of res judicata and collateral estoppel. He also contends that summary judgment is proper based upon the applicable statute of limitations and because Plaintiff did not prevail in the action below. Plaintiff did not respond to the motion.

O.C.G.A. §9-12-40, the codification of Georgia's common law rule of res judicata, provides:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and

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[1] For a more detailed description of the underlying facts, see the Court of Appeals opinion in *Rolleston v. Cherry*, 226 Ga. App. 750 (1997).

> their privies as to all matters put in issue . . . or might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

Under this Code section, res judicata and collateral estoppel will bar a subsequent action or claim if there is an identity of parties and of issues, which were actually litigated or which could have been litigated. *Waggaman v. Franklin Life Ins. Co.*, 265 Ga. 565 (1995); *Lawson v. Watkins*, 261 Ga. 147, 148 (1991); *Blackwell v. Georgia Real Estate Comm'n*, 205 Ga. App. 233, 233-34 (1992); *Stiltjes v. Ridco Exterminating Co.*, 197 Ga. App. 852 (1990); *Firestone Tire & Rubber Co. v. Pinyan* 155 Ga. App. 343, 345 (19800. It is important to note that, while the causes of action are different, res judicata and collateral estoppel are concerned only with identity of subject matter. *Waggaman, supra; Caswell v. Caswell*, 162 Ga. App. 72 (1982). Under the general law regarding identity of cause of action, "[s]o long as a party pleads but one wrong in respect to the same transaction, the cause of action is the same, . . . and it makes no difference that the remedy sought to be applied under different procedures growing out of the same wrong may be different." *McCracken v. City of College Park*, 259 Ga. 490, 491 (1989).

According to the evidence in the record, Plaintiff filed a previous suit in Cobb County Superior Court (Civil Action File No. 981-10119-24) on December 18, 1998. In that complaint, Plaintiff claimed that the settlement agreement between the Cherry Estate and Defendants Coast House and Sandease was champerty and barratry. (Exhibit "A" to Defendant's Motion)[2].

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[2]Certified copies of the Cobb County pleadings were submitted by Koski in support of his motion.

Koski was joined as a defendant in that action based upon the fact that he prepared the settlement agreement as attorney for Coast House and Sandease. (*Id.* at ¶¶ 5, 9). The Cobb County action also claimed that the filing of a malpractice action in Fulton County, as required by the settlement agreement, was abusive litigation. (*Id.* at ¶¶3, 4, 13). After consideration of the case, the Cobb County trial judge awarded summary judgment to the defendants on all claims. (Exhibit "B" to Defendant's motion).

In this case, Plaintiff raises these identical claims. Currently, he asserts that Coast House, Sandease, its officers and directors, and its former attorney, Robert Koski, are liable for champerty, barratry and abusive litigation. Identical to the prior action, Koski was joined as a defendant based upon the fact that he prepared the settlement agreement. (Complaint, ¶¶3, 8). As in the prior case, Plaintiff again claims that the filing of a malpractice action in Fulton County, as required by the settlement agreement, was abusive litigation. (Complaint, ¶2, 4, 9, 11, 12, 3 [Count 2]).

Based upon the above evidence and the record in this case, it is apparent that all of the three criteria for res judicata are met. First, there is an undeniable identity of parties, as Koski was named as a defendant in both actions. Second, there is an identity of causes of action, as both complaints seek damages for champerty, barratry and abusive litigation.[3] The mere fact that Plaintiff relies on two different civil actions to support his claims

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[3]In fact, this Court notes that most of the factual allegations in the two complaints are either completely identical or substantially similar. *See, e.g.*, Cobb Complaint ¶¶2, 5, and 6-12, Fulton Complaint ¶¶2, 3, and 5-11. These examples are not intended to be a complete list, but are illustrative of the identity of claims in this action and the prior Cobb County action.

for abusive litigation does not defeat this finding, as the claim for abusive litigation *clearly* arises out of the same subject matter, i.e., the settlement agreement. Finally, there is a final judgment on the merits in the defendants' favor in the prior lawsuit, as evidenced by the award of summary judgment on Plaintiff's claims.[4]

For these reasons, the motion for summary judgment by Defendant Koski should be and hereby is **GRANTED**. There being no just reason for delay, final judgment is hereby entered against Plaintiff and in favor of Defendant Koski on all claims in the Complaint.

(2) Motion to Dismiss

The remaining Defendants filed a motion to dismiss. In their motion, these Defendants contend that Plaintiff's Complaint must be dismissed because the allegations of the Complaint, even if true, do not support any claim for champerty or barratry. First, they argue that they are not strangers to the malpractice litigation by the Estate, and therefore their agreement payment of any fees or costs incurred in that litigation is not champertous. Second, they argue that Plaintiff's claims for abusive litigation are barred by the applicable statute of limitations and must be dismissed. Finally, these Defendants assert that Plaintiff's claims for barratry must be

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[4]This Court also notes that the same rationale may apply to the other Defendants in this case, as well, since they are likely privies to the judgment in Cobb County. Under Georgia law, privies are "those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right. . ." *Waldroup v. Greene Cty Hospital Auth.*, 265 Ga. 864, 866 n.6 (1995). However, this issue was not raised by the co-Defendants, and it is not necessary for this Court to reach this question in light of the further holding below.

dismissed because this is a criminal statute, without a civil remedy, and because barratry concerns the filing of multiple actions, not a single complaint. Plaintiff did not respond to this motion.

Initially, this Court notes that Plaintiff has not stated any claims against Joseph A. McBride, Timothy B. McBride, and Frank McBride, Jr., the individual Defendants in this action. In fact, the only paragraph which specifically named these individual Defendants is ¶1 of the Complaint, which sets forth the parties addresses. None of the remaining paragraphs of the Complaint mention these individual Defendants. No relief is sought from them, and Plaintiff does not allege in any manner that they were individually involved in the actions at issue in this Complaint. In fact, it appears that the sole reason they are named is because they were officers or directors of Coast House or Sandease. Without any allegations as to personal liability, they cannot, as a matter of law, be held liable for any acts by Coast House or Sandease.

Since the Plaintiff has failed to state any claim against these Defendants, the motion to dismiss is **GRANTED** as to Defendants Joseph A. McBride, Timothy B. McBride, and Frank McBride, Jr. on all counts.[5]

Furthermore, after consideration of the Complaint and the relevant case law, this Court finds that the motion to dismiss is proper as to Coast House and Sandease, as well. First, this Court notes that Plaintiff has no standing to contest the validity or enforceability of the settlement

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[5]This Court further notes that Frank McBride, Jr., is deceased, and Plaintiff has not made any efforts to substitute the Estate as a named party. However, the same rationale would apply even if the Estate were substituted, and a dismissal against it would be proper, as well.

agreement at issue. Under O.C.G.A. §9-2-20, any action on a contract "shall be brought in the name of the party in whom the legal interest in the contract is vested . . ." It is undisputed that Plaintiff is not a party to the settlement agreement at issue. He has no legal rights or obligations under the settlement agreement and, in fact, is a complete stranger to the agreement. It has been specifically held by the Georgia Supreme Court that a stranger to a contract cannot sue to challenge the validity of that contract. *Morris v. Stillwell,* 257 Ga. 3 (1987).[6]

Even assuming, however, that Plaintiff had standing to contest the validity of the agreement, this Court finds that the settlement agreement is not champertous. In the settlement agreement, the Cherry Estate, Coast House and Sandease resolved all issues arising out of the failed sale of the property on St. Simons Island. Pursuant to the agreement, Coast House and Sandease obtained an interest in a number of properties held by the Estate. The Cherry Estate also agreed, among other things, to file an action for malpractice and/or contribution against Plaintiff. Specifically, the agreement provides:

> [The Estate] will hire the attorneys designated by [Coast House and Sandease] to pursue a claim for legal malpractice and/or contribution against Mr. Moreton Rolleston, Jr., on behalf of the Estate. [Coast House and Sandease] will agree to pay any and all necessary expenses involved in said litigation to be pursued on the basis of a contingent fee not to exceed thirty percent. The net recovery of

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[6] In *Morris,* the plaintiff sued for specific performance of a real estate contract between himself and the Stillwell Estate. Steven Weyl, who as a beneficiary of the Estate, intervened and argued that the contract was invalid and should be set aside. The Court determined that Weyl lacked any interest to challenge the contract.

> said claim will be payable upon receipt toward the note referred to in paragraph [6] above, with any remainder after full payment of the note to be paid to the Estate. This litigation is to be commenced as soon as practicable.

Plaintiff alleges that this agreement constitutes champerty and seeks actual damages in the amount of $10 million, plus punitive damages.[7]

Under O.C.G.A. §13-8-2, which prevents contracts which are against public policy, contracts of maintenance or champerty are unenforceable. O.C.G.A. §13-8-2(a)-(5). Champerty is defined as an agreement with a plaintiff or defendant to maintain an action at the party's expense in return for payment of the profits from the litigation. *Meeks v. Dewberry*, 57 Ga. 263 (1876); *Sapp v. Davids*, 176 Ga. 265 (1933); *Anderson v. Anderson*, 12 Ga. App. 706 (1913).[8] Under this definition, there must first be an undertaking by one party to defray the expenses of another's suit, and second, there must be a promise to divide the proceeds of the litigation. *Clark v. Harrison*, 182 Ga. 56 (1936); *Anderson, supra.*

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[7]It is interesting to note that Plaintiff apparently tried to raise champerty as a defense in the underlying malpractice action. However, the Court of Appeals specifically rejected this argument. *Rolleston v. Cherry*, 226 Ga. App. 750 (1997).

[8]Although there has not been much modern litigation concerning champerty in this state, a number of other jurisdictions have addressed this claim recently. For other opinions consistent with this Court's Order, *see, Osprey, Inc. v. Cabana Ltd. Partnership*, 532 S.E.2d 269 (S.C., 2000); *Schwartz v. Eliades*, 939 P.2d 1034 (Nev. 1997); *Kraft v. Mason*, 668 So.2d 679 (Fla. 4th DCA, 1996); *Reinhardt v. Kelly*, 917 P.2d 963 (N.M. App., 1996). For good general discussions of champerty, *see* 14 Am.Jur.2d 843 (1964); Ari Dobner, *Litigation for Sale*, 144 U. Pa. L. Rev. 1529 (1996).

Not all contracts which contain these elements are champertous, however. If the party paying the costs has "any interest" in the outcome of the litigation, or is related to either of the parties by blood or affinity, then the agreement will not be deemed to be champertous. *Johnson v. Hilton,* 96 Ga. 577 (1895); *Anderson, supra.* In effect, the particular interest in the outcome or the relationship of the parties makes the agreement not one between strangers and, thus, not champertous. *Anderson, supra.*

In the present case, it is alleged (and undisputed) that the expenses of litigation were being paid by Coast House and Sandease in return for a portion of the recovery. Even assuming this is true, as this Court must on a motion to dismiss, this agreement falls within the recognized exceptions to champertous contracts, because it is apparent from the face of the pleadings in this action that Coast House and Sandease had a particular interest in the outcome of the litigation between the Estate and Plaintiff. The malpractice action filed by the Estate arose out of the failed real estate transaction at which Coast House was the buyer. As a result of Plaintiff's malpractice, Coast House was required to sue the Estate to recover its monies. (Complaint, ¶ 4). However, the value of the Estate did not cover the amount of its judgment (Complaint, ¶ 6), and under the agreement, in order to fulfill the judgment, Coast House and Sandease would take a portion of the recovery in the malpractice action equal to the amount remaining on the judgment. (Exhibit "A," ¶ 7).

Based upon these facts of this case, it is clear that this case does not involve the classically champertous situation, i.e. one stranger financing another's litigation. Rather, Defendants Coast House and Sandease had a par-

ticular interest in the outcome of the litigation against Plaintiff which made them not strangers to the action.[9] For these reasons, this Court finds that the agreement is not champertous, and the motion to dismiss should be granted on this ground, as well.

Next, these Defendants contend that any claim for abusive litigation should be dismissed, as it is barred by the statute of limitations. Under O.C.G.A. §51-7-84(b), all claims for abusive litigation must be brought within one year of the final termination of the lawsuit at issue. In his Complaint, Plaintiff asserts that the filing of Fulton County Civil action No. D-97003, pursuant to the terms of the settlement agreement, was abusive litigation. (Complaint, ¶12). It is apparent from the face of the Complaint that a final judgment was entered in this case. (Complaint, ¶9). In fact, the Clerk's records demonstrate that a final judgment was entered in Case No. D-97003 on April 7, 1995. As this action was filed well beyond the one year statute of limitations for abusive litigation claims, this Court finds that the Defendants' motion to dismiss this claim should be granted, as well.

Finally, this Court finds that, as a matter of law, there is no civil cause of action for barratry. Under O.C.G.A. §16-10-95, barratry is a criminal offense which is punish-

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[9]This finding comports with more modern law on assignability of judgments and actions. *See*, O.C.G.A. §9-12-21 (all judgments are freely assignable). Historically, actions or judgments were not assignable; hence, champerty was a favored defense to any attempted assignment. However, in modern legal history, actions and judgments are freely assignable, making champerty an unfavored cause of action. In fact, as early as 1890, the Georgia Supreme Court recognized that the ability to assign actions and judgments vitiated the need for champerty. *Reed v. James*, 84 Ga. 380 (1890).

able by a fine of not more than $5,000 or by imprisonment from one to five years. The law is well settled that violation of a criminal statute does not always give rise to civil liability. In order to authorize private litigation on criminal statutes, the legislature must have indicated a strong public policy for imposing both civil and criminal penalties. *Connor v. Tate,* 130 F.Supp.2d 1370 (N.D. Ga. 2001); *Key v. Grant,* 238 Ga. App. 818 (1999); *Doyle Dickerson Co. v. Durden,* 218 Ga. App. 426 (1995); *Rolleston v. Huie,* 198 Ga. App. 49 (1990) (same plaintiff). As there is absolutely no indication that the legislature intended to provide any civil liability for a violation of this statute, Plaintiff cannot state a claim under this Code section.[10] For these reasons, the Defendants' motion to dismiss this Count should be granted.

For the above reasons, the Defendants' motion to dismiss should be and hereby is **GRANTED.** All claims against Defendants Joseph A. McBride, Timothy B. McBride, Frank McBride, Jr., Coast House, Ltd. and Sandease, Ltd. are hereby **DISMISSED** in their entirety.

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[10]Moreover, even if this statute provided civil liability, Plaintiff's claim would still fail, since barratry requires at least three instances of champerty. *Churchwell v. State,* 195 Ga. 22 (1942). In this case, Plaintiff only alleged one suit, which would not constitute barrtry as a matter of law.

SO ORDERED, this 3rd day of May, 2001.

/s/ Stephanie Manis
Judge Stephanie B. Manis
Superior Court of Fulton County
Atlanta Judicial Circuit

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